86 1473

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of DAROLD FLOYD WILSON, and as Guardian of JOLENE KAY WILSON, CRAIG ALLEN WILSON and JERRY TODD WILSON,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred in holding that in a Federal Employer's Liability Act case, 45 U.S.C. §§ 51-60, a federal trial court has no discretion to grant a partial new trial after determining that inescapable perjury and the falsification of railroad records by a railroad employee contributed to jury reduction of a widow's award to 25% of her pecuniary loss.

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JURISDICTION

The judgment of the Tenth Circuit Court of Appeals entered on November 10, 1986 reversing a jury verdict in favor of the Petitioner and reinstating an ear-

lier jury verdict, based in part upon perjured testimony, in favor of the Respondent. The Court of Appeals denied a timely motion for rehearing on December 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATEMENT OF THE CASE

(This is a companion case to another Petition for Certiorari filed on February 6, 1987 with the same case caption and identified as 86-1290. That petition is by the Co-Plaintiff below, Gail Clay, and solely addresses the propriety of the denial of an award of prejudgment interest in Federal Employer's Liability Act cases. Although that issue is extant in this case as well, there was a post-trial separation of the cases and the issue in this petition is germane only to this particular appeal.)

This petition arises from the Tenth Circuit's reversal of the Judgment entered on the Jury's verdict in a second trial which the trial court granted to Petitioner on the ground that in the first trial a defendant employee witness committed perjury and falsified railroad records concerning a material issue in the case. The trial Judge, in granting the new trial, concluded:

> Furthermore, I find and conclude that Cuccia's testimony was the most critical testimony in the case on the issue of the Railroad's negligence. Before they could apportion negligence between the railroad and the plaintiffs' decedents, the jury had to decide to what extent the railroad was negligent. Without this perjured testimony . . . there would have been no evidence that the

> bridge which was washed out was inspected or maintained for a substantial period of time before the washout. Thus the proportion of negligence assignable to the respective parties under the comparative negligence doctrine would have been quite different without the perjured testimony.

Order, November 14, 1983, Appendix A, pp. 3a-4a.

The Tenth Circuit Court of Appeals, while never contradicting the trial court's finding of perjury, nevertheless reversed the trial court's grant of a partial new trial and ordered the reinstatement of the original jury verdict on the basis that the jury might have discarded Cuccia's testimony in arriving at its verdict and that in FELA cases, where there is other evidence in the record which might support the jury's verdict, the jury's verdict will be sustained despite the inescapable taint of perjury.

> In granting the plaintiff's motion for a new trial on the issues of causation and contributory negligence for the sole reason that it disbelieved Mr. Cuccia's testimony, the trial court arrogated the jury's function of assessing credibility to itself. The Supreme Court repeatedly has cautioned trial courts not to substitute their judgment for that of the jury in FELA cases.

Opinion, November 10, 1986, Appendix B, pp. 10a. The Court cited no authority in support of its opinion other than several cases in a long line of decisions by this Court reversing state appellate court decisions abrogating plaintiff's verdicts in FELA cases because of insufficiency of the evidence.

On December 22, 1986, the Tenth Circuit Court of Appeals denied the Petitioner's timely Petition for Rehearing. *Order*, December 22, 1986, Appendix C, pp. 14a.

This is a wrongful death case brought under the Federal Employer's Liability Act, ("FELA"), 45 U.S.C. §51, *et seq.* Petitioner's husband, Darold Floyd Wilson, was employed as a train engineer by the Respondent railroad. On July 3, 1981, he drowned in the waters of a flash flood in Frijole Creek near Trinidad, Colorado, after the flood swept away an eighty year-old bridge shortly before the arrival of his train.

One of the Petitioner's principal claims of negligence on the part of the Railroad was the lack of inspections and insufficient maintenance of the bridge.

Petitioner's expert structural engineer testified that the force of the water on the side of the bridge sheared the anchor bolts which secured the unitary steel girder bridge structure to its concrete supporting abutments, allowing the horizontal bridge beams to topple into the flood waters. Within days of the accident the Respondent Railroad destroyed the remaining bridge abutments and none of the anchor bolts or pieces thereof were ever found. In spite of this loss of evidence, the expert engineer testified that the bolts would have been badly rusted, corroded and weakened over the bridge's 76-80 year existence, materially contributing to the untimely departure of the bridge.

To prove the negligent inspection and maintenance practice of the Respondent Railroad, the Petitioner called the Foreman of Railroad Bridge Maintenance ("Cuccia"), as a witness and the Railroad's bridge

inspection records, made by Cuccia, were subpoenaed. The records were in the form of books having separate pages for entries on each of the bridges Cuccia was responsible for. Cuccia started a new book in October of 1980 which contained approximately five entries showing inspections of the bridge in question and other bridges at approximately 45 day intervals prior to the date of the accident. Upon examination of the new record book, it could be seen that a black obliteration had been made on a line of the page immediately following the October 1980 notation starting the new book and before the entries documenting the inspections. The obliteration was thought to be of a date, made so that the other dated entries could be added in sequence to show inspections that were never made. In order to make the fictitious Frijole Creek Bridge inspection entries consistent with those of other records in the book, the records of 45 other bridges on the same rail line were similarly falsified with sham entries. Cuccia corroborated the record book under oath and said all of the inspections were made.

Falsification of the evidence and the perjury of the witness is manifest when the time necessarily spent inspecting the 46 bridges is added, together with the travel time between bridges, to produce approximately 19 hours of actual inspections, and five hours of travel, all within one day, on four separate inspection trips.

The jury returned a verdict for Petitioner and found her damages in excess of one million dollars. The jury did not find negligence on the part of the railroad in respect to the inspections and maintenance of the bridge. When comparing the negligence which the jury

did find against the railroad and the contributory negligence of Petitioner's decedent, it reduced the Petitioner's award by 75% because of comparative negligence.

After the trial, the trial court found that Cuccia's testimony was not only implausible, it was impossible. The Court held a post-trial hearing to consider any evidence that could be produced that Cuccia could have actually performed the inspections to which he testified. Cuccia's time records produced at the post-trial hearing reflected that he only worked 8 hours on each of the bridge inspection trips recorded. The trial court, after reviewing the additional evidence, responded:

> In the meantime, I have pondered frequently seeking some rational basis on which it could be possible that his testimony was true. I have discovered none. A special hearing has been held and the railroad has filed two lengthy documents, both which I have searched thoroughly for evidence or argument to persuade me that Cuccia was telling the truth. I have found none. His testimony is inherently incredible and I find and conclude that he purposely lied at the trial in order to help his employer of thirty-one years, the railroad. I base this finding on my observations of this witness as he testified at the trial, as buttressed by the inherent inconsistency and impossibility of his testimony.

Order, Appendix A, pp. 3a.

The trial court below ordered a retrial of the allocation of negligence because the falsification of evidence and the perjury tainted the determination of a critical factual issue in the case.

On retrial, solely on the issue of allocation of negligence, Cuccia refused to testify, invoking the protection of the Fifth Amendment. The Petitioner submitted foundation evidence from the prior trial establishing the identity of the bridge inspection books and offered the bridge inspection books as evidence of the lack of inspection and the Railroad's effort to "cover-up" the failures with falsified documents. None of Cuccia's perjured denials and explanations were offered. The second jury, in the absence of the perjured denials and explanations, specifically found the Railroad guilty of additional negligence in failing to inspect and maintain the bridge over Frijole Creek and after receiving instructions from the trial court that there was negligence on both sides, found 10% contributory negligence on the part of the decedent and 90% negligence on the part of the Railroad.

WHY CERTIORARI SHOULD BE GRANTED

CERTIORARI SHOULD BE GRANTED, FOR THE FOLLOWING REASONS, TO REVIEW THE TENTH CIRCUIT OPINION BELOW HOLDING THAT THE TRIAL COURT IN A FELA CASE HAS NO DISCRETION TO GRANT A NEW TRIAL TO THE FAMILY OF A DECEASED RAILROAD ENGINEER KILLED IN THE COURSE OF HIS EMPLOYMENT, EVEN THOUGH THE ORIGINAL JURY VERDICT WAS TAINTED BY INESCAPA-

BLE PERJURY ON THE PART OF A RAILROAD EMPLOYEE.

1. THE DECISION REPRESENTS A SPLIT OF OPINION AMONG THE CIRCUIT COURTS OF APPEAL AS ~~TO THE~~ POWER AND AUTHORITY OF FEDERAL TRIAL COURTS TO EXERCISE DISCRETION IN GRANTING NEW TRIALS IN JURY CASES WHERE THE INTERESTS OF JUSTICE AND THE INTEGRITY OF THE JURY SYSTEM REQUIRE IT.

2. THE DECISION INAPPROPRIATELY RELIES UPON PRIOR SUPREME COURT OPINIONS INTENDED TO PREVENT FELA'S "EROSION BY NARROW AND NIGGARDLY CONSTRUCTION," BY THE STATE APPELLATE COURTS, WHICH WERE ROUTINELY REVERSING PLAINTIFF'S JURY VERDICTS FOR INSUFFICIENCY OF EVIDENCE.

3. THE DECISION SUBSTANTIALLY ERODES THE INTEGRITY OF THE JURY SYSTEM, UNDULY HANDICAPS FEDERAL TRIAL JUDGES IN THE ADMINISTRATION OF TRIALS IN THE FACE OF CLEAR WITNESS PERJURY OR MISCONDUCT, AND ENCOURAGES RAILROADS AND OTHER EMPLOYERS IN THE SUBTLE AND OVERT MANIPULATION OF EMPLOYEE TESTIMONY AND THE ALTERATION OF EVIDENCE.

I. SPLIT OF AUTHORITY AMONG THE CIRCUITS

The Tenth Circuit Court of Appeals decision below directly contradicts prior decisions of the Seventh and Ninth Circuits. In *Atchison, Topeka and Santa Fe Railway Co. v. Barrett*, 246 F.2d 846 (9th Cir. 1957), the Ninth Circuit Court of Appeals held in a FELA

case that where perjury had played some part in influencing the court or jury to render a judgment, the effect of the perjury will not be weighed on a motion to set aside the judgment and that such a motion is directed to the sound discretion of the trial court.

> Discretion is peculiarly and properly left in the trial court in matters of this kind . . . The trial judge saw and heard the [witness]; saw his twitchings, what they were and what they were not, as did the jury. He saw and heard the other matters relied upon by the appellant; he felt the 'climate' of the trial.

Barrett, supra, p. 849. In *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145 (7th Cir. 1966), the Seventh Circuit, relying on *Barrett, supra*, held that it was an abuse of discretion for the trial court not to grant a new trial where there was clear evidence that the judgment below was procured, at least in part, by perjured testimony.

> If it was [perjury], then it was clearly the duty of the district court to set aside the judgment because poison had permeated the fountain of justice.

Peacock Records, supra, p. 147.

This split of authority among the circuits on a matter of such widespread concern as the discretionary authority of federal trial courts to grant new trials under Fed. R. Civ. Proc. 59, upon a clear showing of perjury or misconduct, should not, in the interest of the integrity of the jury system, remain unresolved.

II. EROSION BY NARROW AND NIGGARDLY CONSTRUCTION

All of the cases cited by the Tenth Circuit Court of Appeals to support its reversal of the trial court, except one, were United States Supreme Court reversals of state appellate court abrogation of Plaintiffs' jury verdicts in FELA cases on the basis of insufficiency of the evidence. The other case, *Bashram v. Pennsylvania Rail Co.*, 372 U.S. 699, 10 L.Ed.2d 80, 83 S. Ct. 965 (1963), reversed a Plaintiff's jury verdict set aside by a trial judge on the basis of the insufficiency of the evidence.

None of the cases relied upon by the Court of Appeals below dealt with the issue of perjury or of witness misconduct.

The cases cited by the Court of Appeals are part of a long history of United States Supreme Court reinstatements of Plaintiffs' jury verdicts in FELA cases abrogated below because of "a hostile philosophy that permeated [FELA's] interpretation" in the courts. (*See, Wilkerson v. McCarthy*, 366 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413 (1949), Douglas, J. Concurring opinion, at 69), and to prevent FELA's "erosion by narrow and niggardly construction." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443 (1957).

The same "hostile philosophy" and "erosion by narrow and niggardly construction" are at work in the opinion below which deprives the intended beneficiaries of the FELA of the benefits of the Act by abrogating their right to the supervisory protection of federal trial courts, capable of exercising discretion, where justice requires, to set aside jury verdicts

contaminated by perjury and misconduct by parties or witnesses.

III. THE INTEGRITY OF THE JURY SYSTEM

The authority to grant a new trial is confided almost entirely in the exercise of discretion on the part of the trial court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S. Ct. 188 (1980). The "exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Parker, J., *Aetna Casualty & Surety Company v. Yeatts*, 122 F.2d 350 (4th Cir. 1943), quoted in 11 C. Wright & A. Miller, Federal Practice and Procedure, (1973), p. 28.

> Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials, * * * It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial.

Lord Mansfield, *Bright v. Eynon*, K.B. 1757, 1 Burr. 390, 393, 97 Eng. Rep. 365, quoted in *Aetna Casualty*, *supra*, pp. 353-354 and Wright & Miller, *supra*, p. 28.

> To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is this in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any cause where the ends of justice so require.

Aetna Casualty, supra, p. 354 and Wright & Miller, p. 29.

The opinion below unduly handicaps federal trial courts in their inherent and express power to deflect the contamination of the trial process and too narrowly circumscribes the trial court's remedial powers under Fed. R. Civ. Proc. 59, which provides, *inter alia*:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of issues (1) in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Rule 59 has been widely construed to provide broad supervisory discretion to federal trial court to protect the integrity of the trial process.

> The trial court has broad discretion to reopen the case before the jury has returned its verdict and permit additional testimony to be taken and after the verdict has been returned to grant a new trial because of the absence of a material witness, because of perjury, or because of newly discovered evidence, although due to the short time limitations of Rule 59 relief on the ground of perjury or newly discovered evidence must often be obtained under Rule 60.

6A *Moore's Federal Practice*, 2d Ed. (1984), paragraph 59.08[1], p. 59-81.

The Tenth Circuit's finding that there was a rational basis in the evidence to support the jury's find-

ing begs the question: no one knows what effect Cuccia's perjury actually had upon the first jury. What is known is that the second jury heard only foundation testimony introducing the falsified bridge inspection books. None of Cuccia's perjured denials or explanations tainted the process. The inspection books spoke for themselves and the second jury specifically found the Respondent negligent in maintaining the bridge.

The Petitioner's evidence regarding the falsification of the bridge inspection books was extremely important to her case.

> [W]rongdoing by the party in connection with this case, amounting to an obstruction of justice[,] is also commonly regarded as an admission by conduct. By resorting to wrongful devices he is said to give ground for believing that he thinks his case is weak and not to be won by fair means. Accordingly, a party's false statement about the matter in litigation, whether before suit or on the stand, his fabrication of false documents, his undue pressure, by bribery or intimidation or other means, to influence a witness to testify for him . . . all these are instance of this type of admission by conduct.

McCormick's Handbook On The Law Of Evidence, § 273, p. 660 (2d Ed. 1972).

The decision below, in effect, encourages railroad defendants in FELA cases if they choose to engage in the subtle and overt manipulation of employee testimony and in the alteration of crucial evidence. Frequently, as in this case, all of the fact witnesses in

the case are railroad employees dependent upon the railroad for they livelihood. Frequently, as in this case, all of the material evidence as to the cause of fatal railroad accidents rests in the control of the railroad. Frequently, as in this case, the railroad defendant is self-insured and the result of FELA verdicts have a direct impact on the bottom line of corporate performance. Frequently, as in this case, the temptation to "cook the books" is irresistable.

The Tenth Circuit's speculation in its opinion as to the various possible impacts of Cuccia's testimony on the jury underscores the problem—the perjury contaminated the trial process and impeached the integrity of the result and no resort by the Court of Appeals to other evidence in the case can erase the stigma of doubt as to the fundamental fairness of the first jury verdict.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE WILSON, *et al.*,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD,

Defendant.

NOV 15 1983

ORDER

Following a jury verdict for the plaintiffs which reduced their recovery by 75% for contributory negligence, the plaintiffs have filed a motion asking:

> 1. That I amend the judgment to remove the 75% damage reduction imposed by the jury for contributory negligence.
>
> 2. That, in the alternative, I grant a new trial.

Both parties have fully briefed this motion and I have reviewed my detailed trial notes of the evidence. Extensive oral argument on issues raised by these post-trial motions has been heard. Unfortunately a heavy backlog of cases precludes my taking time to write an opinion on these motions. It appears more important to get them decided so that the case can progress.

I. Motion to Amend Judgment.

As to the plaintiff Gail L. Clay, whose husband Norman Clay was the brakeman, plaintiff's counsel timely objected to all evidence and instructions touching on contributory negligence as to him. The thrust of the claimed contributory negligence was that the engineer proceeded, on a very dark and rainy night, across a ravine where the railroad bridge had been washed out by a flash flood.

The asserted contributory negligence of Clay was that he should have taken over control of the train from the engineer, Wilson, and applied the brakes when Wilson did not do so. The railroad relied upon its rules governing train crews as giving rise to such a duty. There was no evidence whatsoever that Clay either knew, or should have known of any danger ahead on the track which would have justified such extraordinary action. In effect, the railroad's position is that the brakeman, Clay, was required by the rules to mutiny in order to seize control of the train from Wilson, the engineer.

Upon reviewing my notes of the evidence, and having fully considered the briefs of both parties on this issue, I have concluded that it was error to submit to the jury the issue of contributory negligence as to Clay. There simply was no evidence admitted to support a finding that he was negligent in any manner which could have contributed to cause the accident.

The motion to amend the judgment as to the plaintiff Gail L. Clay's claim is granted and it is ordered that judgment be entered in her favor for the full $690,046.00 awarded by the jury, plus interest and costs.

My review of the evidence indicates that there was evidence from which the jury could have found negligence of Wilson which might have contributed to cause the two deaths. Wilson, as engineer, had a duty to look ahead and reasonably exercise his immediate control of the train's

speed, taking prevailing weather conditions into account, so as to avoid running over the washed out bridge. For that reason, therefore, the Motion to Amend Judgment is denied as to the plaintiff Charlotte Louise Wilson.

II. Motion for New Trial.

Plaintiffs have moved, in the alternative, for a new trial. They assert, in support of this motion, that the evidence cannot support the jury's finding of 75% contributory negligence against both plaintiffs and that "obviously perjured" testimony of two employees of the defendant railroad denied them a fair trial.

At the time of the trial it appeared obvious to me that the railroad's witness Cuccia was lying under oath. It seemed clear to me then that his assertions regarding bridge inspections were patently false. They were also contradicted to some extent by the testimony of his supervisor.

In the meantime, I have pondered frequently seeking some rational basis on which it could be possible that his testimony was true. I have discovered none. A special hearing has been held and the railroad has filed two lengthly documents, both of which I have searched thoroughly for evidence or argument to persuade me that Cuccia was telling the truth. I have found none. His testimony is inherently incredible and I find and conclude that he purposefully lied at the trial in order to help his employer of thirty-one years, the railroad. I base this finding on my observations of this witness as he testified at the trial, as buttressed by the inherent inconsistency and impossibility of his testimony.

Furthermore, I find and conclude that Cuccia's testimony was the most critical testimony in the case on the issue of the railroad's negligence. Before they could apportion negligence between the railroad and the plaintiff's decedents, the jury had to decide to what extent the rail-

road was negligent. Without this perjured testimony, and the similarly suspect testimony of the railroad's employee Replinger, there would have been no evidence that the bridge which washed out was inspected or maintained for a substantial period of time before the wash-out. Thus the proportion of negligence assignable to the respective parties under the comparative negligence doctrine would have been quite different without the perjured testimony.

Clearly, however, the perjury did not affect the jury's decision as to liability. The railroad was found liable in spite of it, and there is no reason for putting the plaintiffs to the trouble and expense of re-trying the liability issue because of false testimony by a railroad employee.

I find and conclude that the jury's verdict as to damages was tainted by perjury of at least one railroad employee. Both plaintiffs are, therefore, entitled to a new trial on the issue of damages, including the proportional attribution of damages to the railroad and to each plaintiff.

Defendant Clay has an option to accept either a new trial on these issues or the verdict previously awarded, as amended, subject, of course, to the railroad's right of appeal.

Dated at Denver, Colorado, November 14, 1983.

BY THE COURT

JIM R. CARRIGAN

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

85-1381 85-1400

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson and Jerry Todd Wilson,

Plaintiff-Appellee, Cross-Appellant,

GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Karri Lynn Clay and Boyd Lee Clay,

Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant, Cross-Appellee.

FILED

NOV 10 1986

Appeal From The
United States District Court
For The District of Colorado
(D.C. No. 81-C-1385)

C. William Kraft, III (John L. Pilon and James P. Gatlin, with him on the brief), Denver, Colorado, for Defendant-Appellant, Cross-Appellee.

Gregory R. Piche' of Spurgeon, Haney & Howbert, Professional Corporation, Colorado Springs, Colorado, for Plaintiff-Appellee, Cross-Appellant.

Before McKAY, SETH and TIMBERS,* Circuit Judges.

SETH, Circuit Judge.

These are appeals from a judgment for plaintiff-appellee, Charlotte Louise Wilson, in the retrial of a wrongful death case brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. Defendant-appellant, Burlington Northern Railroad Company, contends that the district court judge erred in ordering the issues of causation and of the quantum of plaintiff's decedent's contributory negligence retried because he found the testimony of a witness implausible. In addition, the Railroad claims that the trial judge erred in not instructing the jury on the act of God defense and on intervening cause, in not recusing himself from the second trial and in admitting in the second trial the very testimony that he had found to have tainted the first trial. Mrs. Wilson cross-appeals arguing that the trial court erred in holding that it lacked jurisdiction to entertain a motion to alter the judgment to include prejudgment interest from the date of the accident because the motion was untimely.

We hold that the trial court should not have granted a new trial on the issues of causation and contributory negligence. Accordingly, we need not address appellant's remaining contentions. We find that the trial court was correct in denying Mrs. Wilson's motion for prejudgment interest since prejudgment interest may not be awarded

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* Honorable William H. Timbers, United States Circuit Judge for the Second Circuit, sitting by designation.

under FELA. *Clay v. Burlington Northern Railroad Co.*, No. 84-1536, ___ F.2d ___ (10th Cir.).

The relevant facts are as follows. Appellee's husband, Darold Floyd Wilson, was a locomotive engineer for the Burlington Northern Railroad. On July 3, 1981, Mr. Wilson drowned after the engine he was operating fell into the Frijole Creek near Trinidad, Colorado where a bridge had been washed out. Mrs. Wilson brought a wrongful death action against Burlington under the FELA in the United States District Court for the District of Colorado.

At the close of the first trial the jury completed a special verdict form. It found that the Railroad was negligent in failing to warn Mr. Wilson of potential flood dangers and in failing to advise him of reported high water or that a track inspection had been ordered. The jury also concluded that the Railroad was negligent in dispatching the train without cautionary orders and without first inspecting the track and bridges along the way after it received notice of rain and high water conditions. Of significance on this appeal the jury specifically decided that the Railroad was not negligent in its inspection and maintenance of the bridge which had washed out.

The jury in the first trial found Mr. Wilson guilty of contributory negligence because he failed to slow his train down when he encountered a severe rainstorm with limited visibility as the Railroad's Consolidated Code of Operating Rules required. The jury so decided that the decedent was 75% contributorily negligent and thus reduced Mrs. Wilson's damages by 75%.

The trial court granted Mrs. Wilson a new trial on the issues of causation and contributory negligence because it was of the opinion that one of the plaintiff's witnesses, Joseph Cuccia, a Maintenance and Inspection Supervisor for the Railroad, had perjured himself. The court expressed its view that Mr. Cuccia's testimony was critical in the case on the issue of the Railroad's negligence. The court

concluded that without this allegedly false testimony the jury would have found, contrary to what it did, that the Railroad's inspection and maintenance of the bridge were negligent and thus would have apportioned negligence differently between the Railroad and the decedent.

After a new trial was granted, the Railroad moved to disqualify the trial judge for bias. The court denied the motion. During the second trial after Mr. Cuccia refused to testify, the trial judge admitted part of Mr. Cuccia's prior testimony into evidence These portions were apparently selected by plaintiff's counsel. The second jury found that the Railroad was negligent in failing to properly design, construct, inspect and/or maintain the bridge. It also determined that the decedent was 10% contributorily negligent.

The FELA, of course, represented a departure from the common-law duty of the master to the servant. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507. In the FELA Congress replaced the common-law duty owed by railroads to their employees with the duty to pay damages to employees or their personal representatives for injury or death due "in whole or in part" to employer negligence. 45 U.S.C. § 51. Under the FELA an employee's contributory negligence will not bar his recovery. 45 U.S.C. § 53. However, an employee's damages "shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," 45 U.S.C. § 53 (with some exceptions not here applicable). Thus, FELA cases generally center on the issue of whether an employer's negligence played any part in the injury or death which is the subject of the suit. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 508.

Congress contemplated that the question of whether employer fault played any part in the employee's injury or death would be decided by the jury. 352 U.S. at 508-509. The 1939 amendments to the original Act were designed

to close the loopholes by which employees were denied jury determinations. 352 U.S. at 508-509. In *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 640, 653, the Supreme Court recognized that

> "[t]he choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

A case that turns on the credibility of witnesses is "peculiarly one for the jury." 329 U.S. at 653.

At the first trial of the instant case the credibility of the witness Cuccia was sharply at issue. The jury was faced with the task of deciding whether the Railroad's inspection and maintenance of the bridge had anything to do with the accident. The plaintiff's theory was that the Railroad's negligent inspection and maintenance caused the bridge failure. The plaintiff maintained that the Railroad permitted the anchor bolts which attached the bridge to concrete abutments on either side of the creek to rust and that due to the rust the bolts gave way under the water pressure. In support of this theory plaintiff called Mr. Cuccia, the Railroad's local Maintenance and Inspection Supervisor, as a witness to testify as to the number of and times of bridge inspections he had carried out.

During the first trial plaintiff's counsel attempted to discredit Mr. Cuccia's testimony to create the inference that Mr. Cuccia had been negligent in inspecting and maintaining the bridge. Plaintiff's counsel asked Mr. Cuccia if he had falsified his inspection book. He questioned the number of bridges Mr. Cuccia claimed to have inspected on certain dates and the thoroughness of his inspections. Counsel reminded Mr. Cuccia that he was under oath and subject to a penalty for perjury if he lied. In his closing argument to the jury, plaintiff's counsel attacked Mr. Cuccia's credibility.

The trial court instructed the jury members that they were

> "the sole judges of the credibility, that is, the believability, of the witnesses, and the weight to be given to their testimony .... If you believe that any witness has willfully testified falsely to any material fact, you may disregard all or any part of that witness' testimony."

Having heard plaintiff's counsel's attempts to call Mr. Cuccia's testimony into question through such adversarial devices as vigorous cross-examination and closing argument and being cognizant of its prerogative to evaluate the credibility of witnesses through the court's instruction, the first jury, as mentioned, determined that the Railroad was not negligent in its inspection and maintenance of the bridge and found Mr. Wilson 75% contributorily negligent.

In granting the plaintiff's motion for a new trial on the issues of causation and contributory negligence for the sole reason that it disbelieved Mr. Cuccia's testimony, the trial court arrogated the jury's function of assessing credibility to itself. The Supreme Court repeatedly has cautioned trial courts not to substitute their judgment for that of the jury in FELA cases. *See, e.g., Davis v. Baltimore & Ohio Railroad Co.*, 379 U.S. 671, 672 (per curiam); *Basham v. Pennsylvania Railroad Co.*, 372 U.S. 653 the Court held that "where ... there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." Courts are not at liberty to override jury verdicts "merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35. A jury verdict may be upset "[o]nly when there is a complete absence of probative facts to support the conclusion reached." Lavender v. Kurn, 327 U.S. 645, 653. Accordingly, in evaluating whether the trial court

erred in granting a new trial, we must determine whether there is a reasonable basis in the record to support the jury's findings.

No matter how the first jury assessed Mr. Cuccia's credibility, there was ample evidence in the record to support the jury's verdict that the Railroad was not negligent in its inspection and maintenance and that Mr. Wilson was 75% negligent. The jury could have believed Mr. Cuccia's testimony as to the number and frequency of his inspections and declined to draw the inferences that Mr. Cuccia's inspections were inadequate and that the Railroad was therefore negligent in the inspection and maintenance of the bridge. The jury could have concluded that Mr. Cuccia lied about the total number and frequency of his inspections of all the bridges listed yet conducted adequate inspection and maintenance of the bridge in issue. The fact that Mr. Cuccia resided relatively near to the bridge may have created the inference that it was more likely than not that Mr. Cuccia would inspect a bridge that near to his home, and the entry in Mr. Cuccia's inspection book indicating that this bridge needed paint is detailed enough to give rise to an inference that he did inspect that particular bridge.

Even if the jury utterly disregarded Mr. Cuccia's testimony, there was a rational basis in the evidence to support the jury's verdict. A crew member of a northbound train which crossed the bridge approximately one hour before the southbound train operated by Mr. Wilson approached had observed nothing out of the ordinary in the bridge's vicinity except for the presence of puddles on a road paralleling the railroad track south of the bridge. This evidence suggests that the large amount of water encountered by Mr. Wilson's train at the bridge was due to a flash flood. Additional testimony revealed that the flood that washed out the bridge prior to the approach of Mr. Wilson's train was of an unparalleled scope, a 100-year or 500-year flood. The testimony of a rear crewman on Mr.

Wilson's train that immediately after the accident he saw water at the height of the bridge's abutments which was continuing to rise buttresses the other testimony as to the magnitude of the flood. Moreover, the Railroad's structural engineering expert testified that the bridge's failure was a consequence of the great water pressure on the side of the bridge's girders which even a bridge with new bolts would not have been able to withstand.

Finally, testimony that Mr. Wilson failed to comply with a Railroad rule which required him to slow his train when he had an indication of high water, to stop to ascertain the storm's extent and to examine bridges supports the finding that Mr. Wilson himself was negligent to a large degree. In sum, the original jury had a reasonable evidentiary basis for concluding that the Railroad's inspection and maintenance of the bridge had nothing to do with the accident.

For the foregoing reasons, we reverse the order of the district court granting plaintiff's motion for a new trial and remand with directions that the first jury's verdict be reinstated.

The district court's order denying Mrs. Wilson's motion for prejudgment interest is affirmed for the reasons articulated in *Clay v. Burlington Northern Railroad Co.*, No. 84-1536, ___ F.2d ___ (10th Cir.).

IT IS SO ORDERED.

Nos. 85-1381 and 85-1400—CHARLOTTE LOUISE WILSON et al v. BURLINGTON NORTHERN RAILROAD CO.

McKAY, Circuit Judge, concurring:

With respect to the court's denial of prejudgment interest, I concur, rather than dissent, for the reasons set forth in my concurring opinion in *Clay v. Burlington Northern Railroad Co.*, No. 84-1536, ___F.2d ___(10th Cir. 1986). The judgment of $1,000,192.00 was not segregated into its component parts of economic loss, for which I would award prejudgment interest, and noneconomic compensation, such as pain and suffering, for which I would not. In addition, the plaintiff failed to submit evidence to support the calculation of an appropriate interest rate.

APPENDIX C

NOVEMBER TERM—December 22, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock and Honorable William H. Timbers*, Circuit Judges.

Nos. 85-1381 and 85-1400

CHARLOTTE LOUISE WILSON, etc.,
Plaintiff-Appellee, Cross-Appellant,

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,
Defendant-Appellant, Cross-Appellee.

The captioned cause comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

The court also has for consideration appellant/cross-appellee's bill of costs and appellee/cross-appellant's objection thereto:

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and

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* of the Second Circuit, sitting by designation.

no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

It is the further order of the hearing panel that the clerk issue a statement of costs in favor of the appellant/cross-appellee in the amount of $348.00 for docket fee and brief reproduction, and that this statement of costs be included in the mandate of these cases.

Judge John P. Moore did not participate.

/s/ ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk